

For Better or Worse, Till ADR Do Us Part: Using Antenuptial Agreements to Compel Alternatives to Traditional Adversarial Litigation

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I. INTRODUCTION

Traditional adversarial divorce proceedings heighten emotions and further distort the conflicts that have already divided spouses. Although a process that alleviates trauma is most needed, divorce litigation often aggravates problems, discouraging cooperation between parties. Traditional adversarial divorce litigation seldom meets the parties' needs, desires and expectations.¹

Nationwide, the rate of divorce is quite high,² and although the majority of divorce actions are uncontested, state courts are flooded with divorce petitions.³ The delays caused by the volume of cases before the courts, along with the gamesmanship of the adversarial process,⁴ usually escalates the spouses' conflict. Traditional adversarial litigation makes the process of divorce "excessively expensive, painstaking and difficult."⁵

Recently, however, a trend has developed which encourages couples to

¹ See Special Project, *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 963 (1984) [hereinafter *Self-Help*].

² See Thomas E. Carbonneau, *A Consideration of Alternatives to Divorce Litigation*, 1986 U. ILL. L. REV. 1119, 1150 (1986). In the past decade, the divorce rate ranged from 45% to 60% of marriages per year. See *id.* The National Center for Health Statistics reported just under 1.2 million divorces in 1990. See Carol R. Flango, *A Statistical View of the Divorce Caseload in the Nation's State Courts*, 16 STATE CT. J. 6, 7 (1992).

³ See Carbonneau, *supra* note 2, at 1150-1151. With the burdensome congestion of court dockets, even uncontested divorce actions may take nearly a year to process; contested cases may take a year or more just to be scheduled for trial. See Jessica Pearson & Nancy Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497, 497 (1984).

⁴ See Carbonneau, *supra* note 2, at 1123 (citing ROBERT E. ALBERTI & MICHAEL L. EMMONS, *YOUR PERFECT RIGHT* 110 (6th ed. 1984)). Generally, the more adversarial the posturing on one side, the more the other side will feel obligated to counter with its own attack. See *id.* See also ROSE DEWOLFF, *THE BONDS OF ACRIMONY* 86-95 (1970).

⁵ Carbonneau, *supra* note 2, at 1119. The criticism of the adversarial process, focusing on its expense, delay and negative effects on litigants, is not confined to the area of domestic relations conflicts, but involves all areas of adversarial litigation. See JETHRO K. LIEBERMAN, *THE LITIGIOUS SOCIETY* 171 (1993). See generally JEROLD S. AUERBACH, *UNEQUAL JUSTICE* (1976).

use alternatives to the traditional divorce process.⁶ The primary alternative remedies are arbitration and mediation.⁷ These methods help decrease the adversity and minimize the trauma that accompany the traditional divorce proceeding.

Rather than force divorcing spouses into adversarial litigation in order to contend with the breakdown of their marriage, alternative processes allow the parties to face the situation in a less combative setting. By permitting parties to play a more active role, arbitration and mediation allow divorcing spouses to assume more responsibility for, and a measure of control over, the termination of their marriage.⁸ Arbitration and mediation may be used in whole or in part and may offer greater flexibility than the rigid adversarial litigation system, making them more appropriate for divorce disputes.⁹

However, there are obstacles to the acceptance and use of alternative forms of divorce litigation. Many divorcing parties are unaware of the disadvantages of the adversarial system.¹⁰ Others wrongly believe that the resolution of such disputes is in the exclusive realm of adversarial litigation.¹¹ Furthermore, parties who are fully aware of the advantages of alternative techniques, when engulfed in the ordeal of divorce, often give in to the temptation to act on emotions and resort to the traditional adversarial process that is known and accepted.¹²

The nonconfrontational techniques of mediation and arbitration are frequently abandoned when a spouse, who harbors negative feelings, welcomes the opportunity to enter the combative setting of divorce litigation.¹³ Often, a spouse refuses to accept an alternative method, even though he or she is well aware that it may be in his or her best interest.

The purpose of this Note is to propose solutions enabling divorcing

⁶ See, e.g., Susan Myers et al., *Court-Sponsored Mediation of Divorce Custody, Visitation and Support*, 13 STATE CT. J. 24, 24 (1989). With the ever-increasing load imposed on the nation's courts, and with the goal of effective management of divorce-related cases, many courts have responded by instituting mediation programs. See *id.*

⁷ See HOWARD DAVIDSON, *ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION* (1982) (discussing alternative mechanisms in the area of family law).

⁸ See Carbonneau, *supra* note 2, at 1125 (commenting that parties often gain both a sense of acceptance and a better understanding of their former relationship from such an experience).

⁹ See Kenneth J. Rigby, *Alternate Dispute Resolution*, 44 LA. L. REV. 1725, 1752 (1984).

¹⁰ See *infra* Part II.

¹¹ See Rigby, *supra* note 9, at 1752.

¹² See Carbonneau, *supra* note 2, at 1165.

¹³ See *id.*

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spouses and attorneys to overcome the aforementioned barriers to implementing alternatives to divorce litigation. In order to overcome these obstacles, legal professionals¹⁴ and divorcing parties must become aware of both the downfalls of adversarial divorce proceedings and the benefits of alternative routes.¹⁵

Moreover, the temptation of using the more traditional, albeit less effective, litigation process must be overcome. To ensure that the recognized advantages of alternative methods¹⁶ to divorce litigation are, in fact, acted upon, this Note proposes using antenuptial agreements¹⁷ to compel the use of alternative methods of dispute resolution. These antenuptial agreements will guarantee the use of the highly beneficial alternatives, thwarting the temptation to pursue the traditional adversarial process. Overcoming this obstacle will be one of the primary goals of this Note.

Section II of this Note presents a brief overview of the major ills of traditional divorce litigation. Section III examines the most widely advocated alternatives: arbitration and mediation. Section IV focuses on the use of antenuptial agreements and proposes how they may be utilized in order to avoid the principal obstacles in the way of implementing alternative methods of dispute resolution. Section V examines recent Ohio court decisions approving the use of antenuptial agreements to secure the use of ADR techniques in divorce proceedings.

II. CRITICISMS OF THE TRADITIONAL ADVERSARIAL DIVORCE

Marriage generates not only a sense of commitment, but also a sense of trust, making spouses vulnerable to one another. As one commentator has observed, divorcing parties relinquish the aspirations of marriage, often focusing upon their disappointment and fixing blame on each other.¹⁸ Traditional adversarial litigation cannot accommodate the complex emotions experienced by divorcing parties. The adversarial process attributes only

¹⁴ Once attorneys themselves learn of the benefits of ADR in the divorce setting, they should inform their clients of all the various options available. One commentator has suggested that such information be routinely offered during the initial client interview as part of the usual description of the divorce process. *See id.* at 1165 n.126.

¹⁵ This hurdle is currently being addressed by numerous commentators as the search for alternative methods to litigation is becoming a "movement." *See infra* Parts II and III.

¹⁶ *See infra* Part III.

¹⁷ Antenuptial agreements are often referred to as prenuptial agreements.

¹⁸ *See* Carboneau, *supra* note 2, at 1129. *See generally* MAUREEN GREEN, MARRIAGE (1984).

minimal, if any, recognition to the trauma that accompanies a divorce.¹⁹ The traditional process of divorce is inadequate because the courts focus primarily on "objective" issues, being unable to deal with the spouses' personal emotional concerns.²⁰

In his Keynote Speech at the ABA National Conference on Alternate Means of Dispute Resolution in June 1982, Frank Sander commented on the adversarial system:

If one were to set out to design a system poorly adapted to the resolution of family conflict or for safeguarding the children, one would, with a little luck, invent the adversarial system presided over by a perplexed, frustrated judge whose background in law and politics have no conceivable bearing on the issues before him or her.²¹

Commentators have expressed many criticisms of the traditional adversarial divorce.²² Judges may feel pressure to decide cases quickly and may not provide divorce cases with the time they require.²³ Further, judges' decisionmaking may become inadvertently biased if they are unable to relate to parties who have lifestyles different from their own.²⁴ Judges may even adopt a sense of patronizing paternalism toward divorcing couples and take a stance toward "punishing" those who do not share "middle class values."²⁵

Moreover, the adversarial system does not lend itself to helping the

¹⁹ See Carbonneau, *supra* note 2, at 1130.

²⁰ See *id.* at 1131.

²¹ Bennett Wolff, Comment, *The Best Interest of the Divorcing Family—Mediation Not Litigation*, 29 LOY. L. REV. 55, 57 (1983) [hereinafter *Best Interest*].

²² However, as one commentator has observed:

Adversarial proceedings do have some worthwhile, albeit limited, advantages. [In] allowing divorcing couples to voice their anger at one another through legal arguments and the formality of judicial proceedings, [the process] civilizes their disagreement, and allows them to focus upon the financial and practical implications of their breakup A court proceeding provides the divorcing couple with an official point of reference by which to arrive at some sort of resolution and perhaps initiate a healing process.

Carbonneau, *supra* note 2, at 1124.

²³ See Anne E. Meroney, *Mediation and Arbitration of Separation and Divorce Agreements*, 15 WAKE FOREST L. REV. 467, 469 (1979).

²⁴ See *id.*

²⁵ *Id.* For analysis of courts acting with "patronizing paternalism" toward the divorcing population, see Robert J. Levy, *A Symposium on the Marriage and Divorce Act*, 18 S.D. L. REV. 531, 532 (1973).

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family who desires to maintain some elements of unity after the divorce, as the adversarial process often exacerbates conflict instead of laying the framework for a future positive relationship.²⁶ Thus, parties seeking a reasonable settlement through adversarial litigation often find that the process alters their intentions.²⁷

Some critics also claim that attorneys lack the necessary knowledge and skill to deal with the interpersonal aspects of divorce.²⁸ Thus, being unable to relate to their clients' needs and concerns, attorneys may replace the clients' views with their own. As a result, the parties may ignore the agreement feeling little duty to adhere to a settlement they had little role in creating.²⁹

Adversarial divorce litigation often has a negative impact on children of a failed marriage, especially when the conflict in the courtroom prolongs the ordeal or when the children themselves become the focus of the dispute.³⁰ Children frequently become pawns in the marital struggle.³¹ This occurrence often leads to divided loyalties and makes the transition to life with one parent, or alternating parents, more difficult.³²

Further, courts are often not the best setting for determining what is in the best interests of the child. As noted by one commentator, judges complain that they must make difficult character evaluations when determining which parent shall retain custody.³³ Due to vague judicial standards and guidelines, judges often impose their own values as the law.³⁴

In sum, there is a growing feeling and increasing evidence that the adversarial system is not the best forum for resolving disputes concerning divorce. The problems with the adversarial process include: increased

²⁶ See Lois L. Gold, *Mediation in the Dissolution of Marriage*, ARB. J., Sept. 1981, at 9.

²⁷ See Meroney, *supra* note 23, at 469.

²⁸ See Jessica Pearson, *Child Custody: Why Not Let the Parents Decide?*, 20 JUDGES J., Winter 1981, at 6.

²⁹ See *Self-Help*, *supra* note 1, at 974.

³⁰ See *id.* at 975. An additional motivation for seeking alternative methods to adversarial divorce litigation is concern over psychological harm caused by the court proceedings. See Myers, *supra* note 6, at 26.

³¹ See Gold, *supra* note 26, at 11.

³² See *id.*

³³ See Pearson, *supra* note 28, at 6.

³⁴ See *Self-Help*, *supra* note 1, at 975 n.891. See, e.g., *id.* (citing Beck v. Beck, 120 N.W.2d 585, 589 (Neb. 1963) (court found wife guilty of adultery and, therefore, declared her an unfit custodian as a matter of law)); see also Vanden Heuvel v. Vanden Heuvel, 121 N.W.2d 216, 220 (Iowa 1963) (except in exceptional circumstances, the mother is the best person to care for children of tender years).

trauma and escalated conflict; low commitment to an eventual agreement or judgment; spouses encouraged to take extreme positions that are at times unnecessarily divisive; failure to enhance cooperation and communication; increased delay in dispute resolution and requiring the involvement of persons who are neither trained nor privy to the interpersonal relationships and nuances involved in the decisionmaking process concerning the dissolution of a marriage.³⁵

III. MEDIATION AND ARBITRATION AS ALTERNATIVES TO DIVORCE LITIGATION

A. Mediation

Focusing upon adversarial litigation as the only means for marriage dissolution in most cases means the prolonging of a painful relationship. Without compromising the essential elements of providing legal order and creating stability, the process for divorce can be supplemented by alternative methods.³⁶ The primary alternative remedies in the area are arbitration and mediation.

Divorce mediation is a practice by which married couples resolve their disputes and negotiate the terms of their marriage dissolution while working with a mediator.³⁷ Although some states have enacted statutes that govern mediation,³⁸ the majority of divorce mediation is voluntary for both parties. Mediation as an alternative to divorce litigation has gained increasing popularity in recent years as private mediation services, offered by attorneys, social workers and mental health professionals, have appeared all over the United States.³⁹

As one commentator noted, "broadly speaking, mediation is a process

³⁵ See Rigby, *supra* note 9, at 1727.

³⁶ See Carbonneau, *supra* note 2, at 1124.

³⁷ See Stephen J. Bahr, *Mediation is the Answer*, FAM. ADVOC., Spring 1981, at 32, 33.

³⁸ California was the first jurisdiction to mandate mediation of child custody and visitation disputes. California law provides for mandatory mediation of child custody issues before adversary proceedings. See Michelle Deis, *California's Answer: Mandatory Mediation of Child Custody and Visitation Disputes*, 1 OHIO ST. J. ON DISP. RESOL. 149, 149 (1985); See CAL. CIV. CODE §§ 4351.5, 4607 (West 1983 & Supp. 1992).

³⁹ See Susan C. Kuhn, Comment, *Mandatory Mediation: California Civil Code Section 4607*, 33 EMORY L.J. 733, 733 (1984) (citing Jessica Pearson et al., *A Portrait of Divorce Mediation Services in the Public and Private Sector*, 21 CONCILIATION CTS. REV., June 1983, at 1, 2). See generally W. Patrick Phear, *Family Mediation: A Choice of Options*, ARB. J., March 1984, at 22, 22-25; see also Henry W. K. Daley & Susan Keilitz, *Court-Based Family Mediation Programs*, STATE CT. J., Fall 1992, at 24.

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to facilitate the clarification of the issues, identify alternatives, reduce acrimony existing between the parties . . . and help parties reach a mutual agreement."⁴⁰ Mediation enables the parties, with the help of the mediator, to negotiate their disputes and reach their own settlement.⁴¹ Notably, a third party does not solve the disagreement for them, as in litigation and arbitration.⁴² In the divorce setting, mediation is often used to assist spouses in reaching a written separation agreement after they have agreed to terminate their marriage.⁴³ The goals of divorce mediation include, *inter alia*: creating an equitable, legally sound and mutually acceptable divorce settlement; avoiding the expense and trauma that accompany litigation and minimizing hostility and post-dissolution controversy.⁴⁴

Mediation gives parties the opportunity "to settle their differences amicably" and to continue their relationship on terms more favorable than those offered by the adversarial litigation process.⁴⁵ Divorce mediation requires each spouse to state his or her demands in the presence of the other spouse and the neutral mediator. When a party speaks only through his or her attorney in the courtroom, he or she becomes less likely to compromise and often feels compelled to take an extreme or unreasonable position.⁴⁶ Mediation, because of its flexibility, enables the parties to consider a broader range of issues relating to divorce, including concerns that may not have been raised in adversarial litigation.⁴⁷ Thus, the mediation process more effectively educates each party about the other's future needs, minimizing the possibility of post-divorce problems.

Furthermore, the time and cost of the mediation process, in stark contrast to litigation, is reasonably predictable. Costs can be budgeted

⁴⁰ Rigby, *supra* note 9, at 1743.

⁴¹ *See id.* The process enables the disputants *themselves* to find their own solution to the conflict. *See* Stephanie Harris, Note, *Court-Connected Mediation of Parental Rights and Responsibilities in Ohio: The Impact of Interim Rule 81*, 10 OHIO ST. J. ON DISP. RESOL. 105, 107 (1994).

⁴² *See* Rigby, *supra* note 9, at 1743. Although similar to arbitration, mediation is simply an aid to negotiation whereby the mediator, while remaining neutral, actively discusses the issues and makes suggestions for the divorce agreement. The third-party mediator, unlike the arbitrator, has no authority to impose a settlement on the parties. *See* Meroney, *supra* note 23, at 470.

⁴³ *See* Rigby, *supra* note 9, at 1743.

⁴⁴ *See* Bahr, *supra* note 37, at 32.

⁴⁵ *Self-Help*, *supra* note 1, at 976-977 (citing Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 239 (1981)).

⁴⁶ *See id.* at 977.

⁴⁷ *See id.* at 976 (citing McEwen & Maiman, *supra* note 45, at 239).

because mediators often charge fees based on a fixed rate, and the participants usually can reach an agreement within a few hourly sessions over the course of two to three months.⁴⁸ Moreover, if the parties cannot reach a settlement through mediation, they may initiate arbitration or litigation with a more lucid understanding of the other party's goals and objectives, further reducing friction.⁴⁹

However, mediation is not for everyone. Commentators have observed that mediation works most effectively for individuals with particular characteristics and propensities: "younger, well-educated, usually professional and materially comfortable couples who accept psychological analysis and thinking."⁵⁰ Mediation is best suited for parties who are comfortable and effective at verbal confrontation. Successful mediation requires the ability to communicate feelings. People who seldom discuss their problems are not likely to succeed; these people usually defer to the mediator or dominant spouse and ultimately are dissatisfied with the outcome.⁵¹ Couples who are unable to mediate should be guided to other forms of alternative dispute resolution, such as arbitration.

B. Arbitration

Many commentators have advocated arbitration as an alternative to traditional divorce litigation. Proponents contend that arbitration helps reduce caseloads, decrease the negative psychological effects of adversarial litigation, may be conducted in a setting more conducive to negotiation and settlement and may be less expensive and consume less time than the traditional adversarial divorce.⁵²

Arbitration is a dispute resolution method in which the participants mutually choose a neutral party to resolve the conflict by rendering a decision which is binding.⁵³ The arbitration process is still adjudicatory but tends to be more informal than traditional litigation.⁵⁴ Divorce arbitration is an option for parties who want to dispense with the disadvantages of the adversarial process but find it difficult to communicate effectively enough to reach a settlement through mediation.⁵⁵

⁴⁸ See Carbonneau, *supra* note 2, at 1168.

⁴⁹ See *Self-Help*, *supra* note 1, at 977.

⁵⁰ Carbonneau, *supra* note 2, at 1175-1176.

⁵¹ See *id.* at 1176.

⁵² See Rigby, *supra* note 9, at 1734.

⁵³ See *id.* at 1733 (citing D. FOLBERG, *DIVORCE MEDIATION: ALTERNATIVE MEANS OF DISPUTE RESOLUTION* 11, 12 (1982)).

⁵⁴ See Rigby, *supra* note 9, at 1733.

⁵⁵ See Carbonneau, *supra* note 2, at 1166.

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In an arbitration proceeding, the divorcing parties, with or without the assistance of counsel, appear before an arbitrator or a panel of arbitrators and present their positions.⁵⁶ Arbitration presents the divorcing spouses with the opportunity to determine who will be the decisionmaker for their dispute. One commentator reasoned that by allowing the participants to make this selection, they may be more likely to accept and comply with the conclusions of an arbitrator than those of a judge, in whose selection they did not participate.⁵⁷

The quality and make-up of the selected arbitral tribunal is critical to the process. The parties' ability to choose their arbitrator may better assure the selection of a decisionmaker who is best qualified by education, experience and manner to adjudicate the dispute.⁵⁸ The arbitrators available to select from include persons having specialized skills, such as accountants, psychologists, social workers, mental health experts, attorneys and retired judges.⁵⁹

After hearing the parties and reviewing the evidence, the arbitrator deliberates and renders a decision.⁶⁰ As the parties choose, the decision may consist of solely the rulings that resolve the dispute or may contain written decisions stating the reasons for the ruling, including any dissenting opinions.⁶¹ The parties can comply with the terms of the award, introduce it in the divorce action for judicial approval and integrate it into the divorce decree.⁶² In contrast, upon a motion to quash or deny enforcement, a party may also oppose the award before the same court.⁶³

A key question concerns the magnitude of judicial scrutiny courts will exercise at the enforcement stage. Excessive review would jeopardize the reasons arbitration was sought in the first place. Conversely, too little review may lead to unjust decisions being upheld when, in the interests of justice and persons not directly involved in the process (*i.e.*, children of the failed marriage), they should not be upheld. Choices as to the form of judicial scrutiny include *de novo* review, review limited to manifest errors of law and a form of review based on technical excesses of arbitral authority and procedural due process violations.⁶⁴

⁵⁶ See *id.* at 1156.

⁵⁷ See Rigby, *supra* note 9, at 1734. "Acceptance or dissatisfaction with a decision has a direct effect on post-decision compliance or resistance to enforcement." *Id.*

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ See Carboneau, *supra* note 2, at 1156.

⁶¹ See *id.*

⁶² See *id.*

⁶³ See *infra* text accompanying note 95.

⁶⁴ See Carboneau, *supra* note 2, at 1157-1158. The question is raised, what should be

Arbitration is a viable alternative to divorce litigation. Arbitration addresses many, but not all, of the criticisms of traditional divorce litigation.⁶⁵ Commentators have noted that arbitration has a high acceptability factor among judges, lawyers and the general public; arbitration machinery exists; procedures have been promulgated and tested; arbitration is legislatively recognized and this method of dispute resolution is currently readily available to the disputants.⁶⁶ Moreover, the American Arbitration Association⁶⁷ has devised a model framework for submitting divorce disputes to arbitration.⁶⁸ For these reasons arbitration deserves consideration as a possible alternative to traditional divorce litigation.

IV. THE USE OF ANTENUPTIAL AGREEMENTS: A STRATEGY TO AVOID A PRINCIPAL OBSTACLE TO IMPLEMENTING ADR

Mediation and arbitration proceedings are available as alternative dispute resolution methods in the divorce setting.⁶⁹ They may be used exclusively or adapted and combined in order to create the most appropriate remedy. However, as previously stated in this Note, one of the obstacles to their utilization is the misbelief that the resolution of divorce disputes is the

the relation between the divorce arbitrator and the judicial system? Many courts act in a supervisory role, intervening only in matters when justice so requires, except in disputes concerning child custody or child support, where third-party interests may warrant a higher level of review. The legal system likely will limit the authority of arbitral tribunals in regard to child custody or child support because the welfare of a minor is directly at issue. Under the doctrine of *parens patriae*, the courts and not a third-party arbitrator, traditionally, have been entrusted to protect the best interests of the child. See J. F. Ghent, Annotation, *Validity and Construction of Provision for Arbitration of Disputes as to Alimony or Support Payments, or Child Visitation or Custody Matters*, 18 A.L.R.3d 1264 (1995). However, there has been movement in this area to allow for arbitrators to even determine matters of temporary or permanent child support. See *infra* Part V.

⁶⁵ See Rigby, *supra* note 9, at 1734. One commentator has observed that although permitting the parties an opportunity to present conflicting demands, arbitration does not give the parties the right to directly participate in the resolution of the dispute. They have no direct input into the actual decision that resolves the dispute, so the decision has some similarities to the adversarial process. The decision is made for them by a third party whose decision is final, possibly only differing slightly from a judge in many participants' minds. Many critics feel that the arbitration procedure is still too adversarial, albeit a little more informal. See *id.*

⁶⁶ See *id.* at 1740.

⁶⁷ The American Arbitration Association is a private, nonprofit association that acts as an impartial administrator of arbitrable disputes. See *Self-Help*, *supra* note 1, at 937 n.583.

⁶⁸ See AM. ARB. ASS'N, FAMILY DISPUTE RESOLUTION PROCEDURE (1982).

⁶⁹ See *supra* Part III.

exclusive province of the adversarial system. Notably, legal professionals and commentators have begun to re-orient their thinking in this regard, suggesting creative approaches to solve the problems associated with adversarial litigation. Yet another obstacle to implementing ADR techniques in the divorce setting is the lack of knowledge of the major drawbacks of adversarial litigation. This obstacle will remedy itself as the evils of adversarial divorce litigation become better known.⁷⁰

The greatest hurdle for applying ADR techniques comes from divorcing parties who are unwilling to consider anything but a litigious resolution of their disputes.⁷¹ Implementing alternative dispute resolution in the field of divorce forces the disputing parties to adopt a "rational course of conduct amidst conflict."⁷² The question remains whether spouses involved in a traumatic matrimonial breakdown can cooperate enough to agree upon an alternate adjudicatory process.⁷³ The divorcing parties' desire to act on emotions and resort to the procedure that is most familiar, to trust the adversarial litigation process, is at times irresistible.⁷⁴

In many instances, the abandoned spouse is "embittered and often prone to vindictive retaliation."⁷⁵ This spouse may find in litigation a means to communicate disapproval and anger. In actions involving situations such as adultery, alimony or child custody, the litigation process may be used to express feelings of victimization or as a tool for retaliation.⁷⁶ The emotions that accompany divorce proceedings encourage the spouses to engage in "single-minded advocacy."⁷⁷ Many spouses at the time of divorce have no interest in pursuing ADR techniques and may even encourage protracted court actions.⁷⁸

The use of ADR techniques is tied to the willingness of divorcing spouses to forego the traditional pattern of adversarial litigation.⁷⁹ More

⁷⁰ See *supra* Part II.

⁷¹ See Carbonneau, *supra* note 2, at 1175.

⁷² *Id.* at 1127.

⁷³ See *id.* at 1165. The level of conflict between the parties is often too high to permit communication. See Kuhn, *supra* note 39, at 757-758.

⁷⁴ See Carbonneau, *supra* note 2, at 1165.

⁷⁵ *Id.* at 1131-1132. However, the abandoning spouse, anxious to conclude the relationship, will resent legal "tactics" meant to disrupt and delay the divorce proceedings. See *id.* at 1132.

⁷⁶ See *id.*

⁷⁷ While the spouses might not initially desire this situation, they may gradually find themselves in it. See O.J. COOGLER, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT 11-12 (1978).

⁷⁸ See Carbonneau, *supra* note 2, at 1132.

⁷⁹ See Kuhn, *supra* note 39, at 757. Kuhn states that although ADR methods such as

often than not, mediators and arbitrators cannot supply spouses with the necessary motivation. A divorcing spouse unwilling to accept the finality of divorce needs an external coercive process in order to forego the temptation to pursue vindictive feelings through adversarial litigation.

Consequently, the use of antenuptial agreements must be examined. An antenuptial agreement contingent upon divorce is a contract that regulates any number of issues that may arise out of the circumstances of marriage, including what form of dissolution to pursue in the case of divorce.⁸⁰ Antenuptial agreements may be utilized as a device that ultimately mandates ADR techniques if a divorce arises.

Initially, courts viewed these agreements as void per se on public policy grounds.⁸¹ Courts determined that these agreements promoted and facilitated divorce.⁸² However, today the vast majority of courts have abandoned this traditional view and now recognize the validity of antenuptial agreements.⁸³ The main reason for the acceptance of antenuptial agreements is that "in a society in which divorce is prevalent, prospective spouses have a legitimate interest in planning for such an occurrence."⁸⁴ Utilizing antenuptial agreements to mandate ADR in divorce proceedings will neither encourage thoughts of divorce nor remove any of the "romance" that abounds in the early stages of matrimony.⁸⁵ To the contrary, antenuptial agreements, by providing peace of mind and stability, may actually enhance the prospects for romance and excitement.

Antenuptial agreements that mandate foregoing adversarial litigation in favor of ADR techniques may encourage open and honest communication at a time of marital unrest.⁸⁶ If the possibility of divorce is being considered,

mediation provide alternatives to the adversarial system, the implementation of such procedures usually requires a voluntary commitment by the parties to reach an agreement. *See id.*

⁸⁰ *See* Homer H. Clark, Jr., *Antenuptial Contracts*, 50 U. COLO. L. REV. 141, 159 (1979).

⁸¹ *See* Phillip A. Gebhardt, Case Comment, *Antenuptial Contracts Contingent Upon Divorce Are Not Invalid Per Se: Ferry v. Ferry*, 46 MO. L. REV. 228, 229 (1981).

⁸² *See Self-Help*, *supra* note 1, at 966.

⁸³ *See infra* Part V.

⁸⁴ *Self-Help*, *supra* note 1, at 965.

⁸⁵ In response to critics who say such an approach to marriage removes the "romance and excitement," one commentator advocating the use of antenuptial agreements notes that the American divorce rate questions the existence and effect of "romance," and that the predictability and security provided by a binding antenuptial agreement can improve the long-term prospects of the relationship. *See* Linda S. Kahan, *Jewish Divorce and Secular Courts: The Promise of Avituzur*, 73 GEO. L.J. 193, 223 (1984).

⁸⁶ *See id.* at 222-223.

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couples will not be encouraged to magnify and distort their problems in anticipation of an adversarial proceeding if a cooperative process, such as mediation, lies in the near future.⁸⁷ Thus, using antenuptial agreements to compel ADR may actually help save marriages.

As a general rule, spouses need to be represented by separate counsel when entering into an antenuptial contract; separate counsel enable *both* spouses' interests to be protected.⁸⁸ Thus, the requirements for creating a valid antenuptial agreement help ensure that no spouse will be taken advantage of by being coerced into a forum for dispute resolution for which he or she is not well-suited. For example, a couple consisting of a dominating spouse and a weak spouse should not be directed to mediation.⁸⁹

Moreover, parties may modify or revoke antenuptial agreements with their full and free consent if doing so does not infringe upon the rights of third persons.⁹⁰ Thus, if both parties have clear, mutual and express intent, they may revoke their decision to forego adversarial litigation if they so desire.⁹¹

Mandating the use of ADR in divorce litigation via the use of antenuptial agreements will allow spouses to avoid the disadvantages of adversarial litigation, while overcoming a major hurdle to implementing consensual arbitration and mediation. This process will provide a procedure that meets basic standards of fairness, including predictability of result, and will promote finality of determining marriage dissolution. By mandating an alternative to adversarial litigation *before* the onset of the trauma of divorce, parties will be more successful in achieving an equitable resolution than if the parties attempted to implement ADR techniques at a time of tension and turmoil.

When prospective spouses consult their attorneys concerning legal issues accompanying marriage,⁹² the prospects of mandating ADR through

⁸⁷ "Commentators and courts are beginning to examine [antenuptial agreements] as both a preventive measure that forces a couple to contemplate their goals, and as a planning device that can facilitate a court's job in the event a divorce occurs." *Id.* at 222.

⁸⁸ *See id.*

⁸⁹ Most jurisdictions have similar laws for creating valid antenuptial agreements. Ohio law requires that the antenuptial agreement be entered into freely, without fraud, duress, coercion or overreaching; in short, the court looks at the fairness of the procedure in creating the agreement. *See generally* Gross v. Gross, *infra* note 100.

⁹⁰ *See* 2 ALEXANDER LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS 90-104 to 90-105 (rev. ed. 1983).

⁹¹ For a number of model antenuptial agreements, including agreements regarding cancellation of antenuptial agreements, *see id.* at 90-3 to 90-23.

⁹² When spouses decide to obtain legal counsel, they are often hurt and angry, and their goal may not only be to dissolve the marriage but also to extract vindication through litigation

an antenuptial agreement should be suggested. Therefore, even if an antenuptial agreement mandating ADR is not agreed upon, at the very least this will serve to make future spouses aware of the perils of adversarial divorce litigation.

V. *KELM v. KELM*⁹³

On August 6, 1982, Russell and Amy Kelm were married in Columbus, Ohio. Prior to the marriage, the parties entered into an antenuptial agreement which contained an arbitration clause.⁹⁴ On January 22, 1990, Russell Kelm filed for divorce. In August of the same year, the trial court entered a judgment finding that the arbitration clause was binding upon the parties. Thereafter, Amy Kelm filed for relief from judgment. Relief was granted and Russell Kelm subsequently appealed.⁹⁵

On appeal, the issue was raised as to the basic validity of a provision in an antenuptial agreement for arbitration of child-support, alimony and

against their former spouse. Attorneys representing such clients may feel they are representing their clients best by resorting to adversarial advocacy. If lawyers recommend an approach that does not conform to their clients' wishes, even if it may result in a more equitable outcome, they may feel like they are slighting the clients. Moreover, with attorneys' ethical responsibility to represent the best interests of their clients, they may not feel that they should allow their clients to participate in a process in which they as attorneys do not play a major role.

These are some of the reasons why divorce attorneys infrequently recommend foregoing traditional litigation in lieu of consensual alternative dispute resolution. Thus, an antenuptial agreement will not only preclude a spouse from turning to adversarial litigation, but will preclude an attorney as well, especially if the attorney that represents the client in creating the antenuptial agreement is not a divorce attorney. See *Self-Help*, *supra* note 1, at 974; see also Carbonneau, *supra* note 2, at 1165.

⁹³ 623 N.E.2d 39 (Ohio 1993).

⁹⁴ See *Kelm v. Kelm*, 597 N.E.2d 535, 536 (Ohio App. 1992). Paragraph 10 of the parties' antenuptial agreement provides, in relevant part:

In the event of a dispute between the parties hereto over an arbitrable matter . . . such dispute shall be resolved by arbitration to the extent permitted by law. A dispute over an arbitrable matter shall mean only (a) a dispute as to the alimony or child support provisions incident to a termination of their marriage, or (b) a dispute regarding the nature, extent and division of real or personal property acquired during their marriage

Kelm, 623 N.E.2d at 41.

⁹⁵ See *Kelm*, 597 N.E.2d at 535.

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property-division matters.⁹⁶ The court noted that, in general, provisions for arbitration are preferred and are to be encouraged.⁹⁷ The court further stated that the favoring of arbitration is not a recent matter, as Ohio has long advocated arbitration of disputes. The court noted that arbitration was enforced both at common law and by statute.⁹⁸ Thus, the court concluded that "[i]t is the policy of the law to favor and encourage arbitration, and every reasonable intendment will be indulged to give effect to such proceedings and to favor the regularity and integrity of the arbitrator's acts."⁹⁹

The court further noted that the enforceability of antenuptial agreements generally was not established until the decision in *Gross v. Gross*.¹⁰⁰ Since *Gross*, antenuptial agreements have been valid in Ohio. In conclusion, the court held:

Since antenuptial agreements are enforceable, there appears to be no reason why the strong public policy of encouraging arbitration, rather than resort to litigation, should not likewise apply to antenuptial agreements. There appears to be no Ohio case authority upon this issue . . . defendant refers to no authority supporting a position that an arbitration clause in an antenuptial agreement is *per se* unenforceable¹⁰¹

In short, the court stated that it found no public policy or adverse authority against submitting to arbitration matters arising under an antenuptial agreement where the parties have agreed thereto.¹⁰²

Kelm, with its "long and convoluted" history of countless hard-fought procedural issues, was eventually appealed to the Supreme Court of

⁹⁶ See *id.* at 538.

⁹⁷ See *id.* at 539. See, e.g., *Hillsboro v. Fraternal Order of Police*, 556 N.E.2d 1186, 1188 (Ohio 1990); *Board of Educ. of the Findlay City School Dist. v. Findlay Educ. Ass'n.*, 551 N.E.2d 186, 189 (Ohio 1990); *Independence Bank v. Erin Mechanical*, 550 N.E.2d 198, 200 (Ohio App. 1988).

⁹⁸ See *Kelm*, 597 N.E.2d at 539.

⁹⁹ *Id.*

¹⁰⁰ 464 N.E.2d 500 (Ohio 1984). Paragraph one of the syllabus of the court holds: "Antenuptial agreements containing provisions for disposition of property and setting forth amounts to be paid as sustenance alimony upon a subsequent divorce of the parties are not contrary to public policy." *Id.* at 501.

¹⁰¹ *Kelm*, 597 N.E.2d at 539.

¹⁰² See *id.* The court noted that any arbitration award may come back to the trial court upon a motion under Ohio Revised Code §§ 2711.09, 2711.10, 2711.11 and 2711.12 in proceedings designed either to confirm or to set aside the arbitration award. See *id.*

Ohio.¹⁰³ The Supreme Court noted that "the court of appeals strongly endorsed the use of arbitration provisions in antenuptial agreements. Appellant did not appeal, to this court, the March 26, 1992 decision of the court of appeals."¹⁰⁴ The Supreme Court clearly and deliberately stated that the appellate court's approval and encouragement of the use of arbitration clauses in antenuptial agreements was not being challenged. Moreover, the Supreme Court demonstrated further approval of the appellate court's decision on this matter by restating that arbitration has long been favored by the law¹⁰⁵ and that antenuptial agreements, when properly implemented, are enforceable in Ohio.¹⁰⁶

The single question before the Supreme Court was whether, in a domestic relations case, matters of temporary spousal or child support may be made subject to an agreement to arbitrate.¹⁰⁷ The court stated that other jurisdictions concluded that arbitration is a viable means of resolving disputes incident to divorce or separation.¹⁰⁸ Noting that the time had come to join other sister jurisdictions, the court held that in a domestic relations case, matters of child support may be made subject to an agreement to arbitrate.

Furthermore, the court held that Ohio Revised Code Title 31 and Ohio Civil Rule 75,¹⁰⁹ read in conjunction with Ohio Revised Code Chapter 2711,¹¹⁰ allowed a trial court to intervene and oversee that arbitration of spousal and child support is accomplished in an efficient and reasonable manner.¹¹¹ Nevertheless, the court stated that it believed that the best interests of a child and spouse could be protected in an arbitration proceeding as well as in a trial court.¹¹²

VI. CONCLUSION

The use of ADR in the divorce setting assures a sense of achievement

¹⁰³ 623 N.E.2d at 40.

¹⁰⁴ *Id.*

¹⁰⁵ *See id.*

¹⁰⁶ *See id.* at 41.

¹⁰⁷ *See id.* at 40.

¹⁰⁸ *See id.* at 41. *See, e.g.,* *Bandas v. Bandas*, 430 S.E.2d 706, 708 (Va. App. 1993); *Faherty v. Faherty*, 477 A.2d 1257, 1261 (N.J. 1984); *Hirsch v. Hirsch*, 333 N.E.2d 371, 374 (N.Y. 1975).

¹⁰⁹ These provisions make evident the fact that trial courts have a duty to ensure that spouses and children are adequately protected. *See Kelm*, 623 N.E.2d at 42.

¹¹⁰ *See supra* note 102.

¹¹¹ *See Kelm*, 597 N.E.2d at 539.

¹¹² *See id.*

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and gives divorcing spouses a better understanding of their future relationship in the unfortunate, but statistically probable, event of a divorce. Parties who voluntarily and responsibly work to achieve their own divorce settlement are more likely to remain satisfied and comply with the terms of the decree than parties who choose to litigate their dispute.¹¹³ Moreover, using an alternative to divorce litigation may also enhance the parties' capacity to engage in parenting after divorce.¹¹⁴

However, the use of alternative techniques is dependent upon the willingness of divorcing couples to forego the traditional pattern of adversarial litigation. Unfortunately, more often than not, spouses give in to the temptation to pursue vindictive feelings through adversarial divorce litigation. Mandating ADR methods through the use of antenuptial agreements overcomes this obstacle, ensuring that parties avoid the troubles associated with traditional adversarial divorce litigation. In an analogous situation, parties to commercial contracts who want to avoid the pitfalls of traditional litigation frequently incorporate into their initial contract an agreement to use ADR in settling all future disputes that arise out of performance of the contract.¹¹⁵

At the time of divorce, couples are undergoing an emotional trauma. Granted, compelling divorcing parties to use alternative dispute resolution via antenuptial agreements will not make this painful process pleasant. However, antenuptial agreements mandating ADR techniques can help to eliminate litigious confrontations, reduce the cost of dispute resolution, encourage couples to work toward their own solutions and help foster better relations between ex-spouses and their children after the divorce process is complete.

¹¹³ A court decision perceived by the parties to be unfair can lead to trauma, lack of compliance and further litigation. However, when couples reach their own decisions, they are far less likely to continue using the legal process to harass each other. See Martha L. Ramey et al., *Joint Custody: Are Two Homes Better Than One?*, 8 GOLDEN GATE U.L. REV. 559, 578-579 (1979).

¹¹⁴ See Carbonneau, *supra* note 2, at 1125.

¹¹⁵ Parties engaged in commercial transactions use ADR in almost any context in which they desire private resolution of their dispute, including: building and engineering contracts, agency and distribution arrangements, partnership agreements, individual employment contracts, leases, state matters, government contracts, stock exchange transactions and insurance disputes among others. See *Self-Help*, *supra* note 1, at 922 n.476.

